

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TODD W. FENIMORE)	
Claimant)	
VS.)	
)	Docket Nos. 1,043,845
KANZA SERVICES, LLC)	1,046,226
Respondent)	1,050,164
AND)	
)	
AMERICAN GUARANTEE & LIABILITY INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the June 24, 2013, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on October 25, 2013, in Wichita, Kansas.

APPEARANCES

Patrick C. Smith, of Pittsburg, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In their briefs to the Board, both claimant and respondent stipulate that page 5 of the Award incorrectly calculates the right upper extremity award in Docket No. 1,043,845. Both parties stipulate the award should be limited to the right forearm rather than the right shoulder as was utilized by the ALJ.

ISSUES

This appeal consists of three docketed claims that were consolidated for Regular Hearing purposes. Docket No. 1,043,845 was pled as a general body disability based on repetitive and cumulative work duties beginning on April 10, 2008 and continuing. The ALJ

determined this to be a left shoulder claim with a possible neck injury. Docket No. 1,046,226 was pled as a general body disability based on repetitive and cumulative work duties beginning April 1, 2009 and continuing. The ALJ determined this case to be a bilateral carpal tunnel case. Docket No. 1,050,164 was pled as a general body disability based on repetitive and cumulative work duties beginning October 1, 2009 and continuing. The ALJ determined this case to be a right shoulder claim with a possible neck injury.

The ALJ found the following:

Docket No. 1,043,845

With respect to this claim the ALJ found the opinion of Peter V. Bieri, M.D., the court-appointed neutral examiner, to be persuasive as to the nature and extent of the claimant's injury to his left shoulder. The ALJ awarded claimant a 25 percent impairment at the level of the shoulder. He also awarded claimant a 10 percent impairment to the right upper extremity for residuals of entrapment neuropathy of a mild nature, at the level of the right wrist, but granted an award to the shoulder. (See above stipulation) The ALJ found that the claimant's carpal tunnel claim arose out of and in the course of his employment and that there was notice of that claim. However, he found the evidence in the record supported a finding that timely notice was given in Docket number 1,043,845 and not in Docket number 1,046,226.

Docket No. 1,046,226

The ALJ denied any award or benefits under this docket number after finding claimant failed to give timely notice in this claim.

Docket No. 1,050,164

The ALJ indicated the respondent stipulated claimant met with personal injury by accident on October 1, 2009 through the last day worked, although no specific date was agreed upon. Therefore, based on that stipulation and the evidence and circumstances of the injury, the ALJ found claimant's accident date to be October 1, 2009, for this claim. He went on to state that this was a somewhat unusual designation of an accident date because the parties excluded dates within their stipulation on which a statutory date of accident could have been found. He went on to find claimant suffered an 11 percent impairment at the level of the (right) shoulder and ordered an award on that basis.

Claimant appeals, arguing the ALJ erred in not finding he sustained some permanent impairment to the cervical spine. Claimant contends the Board should find he has a 10 percent impairment of function to the cervical spine based on the opinion of Dr.

Prostic. Claimant contends that, at the very least, the ratings of the two physicians should have been averaged.

Respondent argues the Award should be modified to correct the calculation error in Docket No. 1,043,845, but otherwise affirmed.

The issue on appeal is the nature and extent of claimant's impairment.

FINDINGS OF FACT

Claimant was a 10 year employee of respondent in its railroad car repair facility. His job duties included welding, grinding, using a jackhammer and other physical labor duties. Claimant would work overhead, or on his knees, and all positions in between. A significant amount of the work involved overhead grinding. Claimant testified he would use a grinder eight to ten hours a day, in various positions. Almost 95 percent of the time he was looking up. He was required to lift between 30 and 90 pounds repetitively while performing this job.

In April 2008, claimant began experiencing neck pain, tingling in his hands and sharp pain shooting down his neck and shoulders. Due to the development of hand problems, claimant began to drop things. Claimant testified respondent sent him for medical treatment after he reported that he was hurting and was going to see a doctor on his own if they didn't do something. Claimant didn't report how he hurt his neck, shoulders, arms and hands, because, at first, he thought he just pulled something. Six months prior to that time he had been working on truck engines and locomotives. Claimant was initially sent to Daniel J. Koehn, M.D., who then sent him to Mike Zafuta, M.D. Dr. Koehn felt claimant had problems with the nerves in his neck.

Claimant had post distal clavicle excision surgery on his left shoulder on October 24, 2008, with Dr. Zafuta. The procedure was not successful. In March 2009, claimant met with Dr. Zafuta, for a recheck of his left shoulder. Claimant reported increased pain in the anterior aspect of the shoulder and paresthesias in his hands, with numbness in his fingers. Dr. Zafuta diagnosed persistent pain, status post distal clavicle with possible cervical radiculopathy and bilateral cubital tunnel syndrome. He recommended an EMG nerve conduction study of the bilateral upper extremities and an MRI of the neck.

Claimant testified that he reported his neck pain to all of the physicians he met with. He complained of loss of feeling in three of his fingers and of aching and popping in his shoulders. These symptoms kept claimant up at night, and he has lost the ability to participate in a lot of the activities that he used to perform.

Claimant met Dr. Chris Fevurly for an examination, on May 4, 2009. Dr. Fevurly reported that claimant was having trouble performing his work duties and was only getting 20 to 28 hours work a week because of the heavy physical labor. Claimant reported significant pain in his neck and shoulders and his hands kept falling asleep. Claimant reported missing about 4 months of work since his April 10, 2008, work injury. He reported pain with prolonged lifting, twisting, pushing and pulling with the left arm in an overhead fashion, and left-sided neck pain, shoulder pain and associated numbness in both upper extremities. Claimant continued to perform yard work and home gardening.

An MRI of the cervical spine revealed degenerative disk disease with no evidence of cord impingement or significant neural foraminal stenosis and no evidence of a herniated disk.

Dr. Fevurly examined claimant and diagnosed left shoulder acromioclavicular joint arthrosis with mild to moderate improvement in the left shoulder following a distal clavicle excision, chronic left upper back and left neck pain and bilateral hand numbness and tingling. He found no current evidence of rotator cuff insufficiency or labral injury. He opined that the development of the left shoulder AC joint arthrosis was contributed to by the performance of the repetitive forceful overhead pushing, pulling and lifting in his usual and customary job duties. He found the upper back and neck pain to likely be compensatory shoulder girdle muscle fatigue due to pain in the left shoulder. There was no evidence of cervical cord impingement or cervical radiculopathy as the source of the left trapezius/left cervical paraspinal pain. Finally, Dr. Fevurly found the hand numbness and tingling consistent with peripheral nerve entrapment/carpal tunnel syndrome. There has been no testing to confirm this, but the examination and claimant's history are consistent with bilateral peripheral nerve entrapment of the median nerve at the wrist. Claimant was encouraged to follow through with the EMG nerve conduction study of the bilateral upper extremities recommended by Dr. Zafuta.

Dr. Fevurly assigned a 10 percent left upper extremity impairment for shoulder AC joint arthrosis. He did not feel claimant was at maximum medical improvement for the carpal tunnel syndrome and did not rate it.

Dr. Fevurly provided a supplement to his IME on May 21, 2009, at which time he found the carpal tunnel syndrome to be idiopathic and most likely related to claimant's body mass index and not the April 10, 2008, event. He noted that claimant's numbness, tingling and wrist complaints began on March 31, 2009, which was after claimant's left shoulder surgery, and there was no probable causal relationship between the carpal tunnel syndrome and either the work event of April 10, 2008, or claimant's duties as a laborer/welder.

Claimant met with Pat Do, M.D., for a court-ordered IME on October 22, 2009.

Claimant had complaints of left shoulder pain that was stable and under control and of bilateral hand pain. Claimant reported that his pain level was a 9 out of 10.

Dr. Do examined claimant and opined he was status post left shoulder distal clavicle excision and determined claimant had bilateral hand pain with numbness and tingling with signs and symptoms of carpal tunnel syndrome and maybe cubital tunnel syndrome because of some numbness and tingling on the ulnar innervated fingers. Dr. Do felt that claimant's bilateral upper extremity complaints are more probably than not related to his work activities, and that welding and grinding could aggravate, accelerate or cause the symptoms. He recommended nerve testing to confirm the carpal tunnel syndrome and the cubital tunnel syndrome, and recommended physical therapy and cortisone injections.

Dr. Do opined claimant was at maximum medical improvement for the left shoulder and assigned a 7 percent left upper extremity impairment.

Dr. Do performed right carpal tunnel surgery on November 23, 2009, with claimant's initial reaction on December 4, 2009, being positive. Due to the positive result from the right carpal tunnel surgery, claimant elected to proceed with left carpal tunnel surgery which occurred on January 22, 2010. Dr. Do performed surgery on the left shoulder on June 7, 2010, and on the right shoulder surgery first on January 17, 2011, and again on October 3, 2011. Dr. Do released claimant with restrictions, which claimant presented to respondent. Claimant was told to stay home and he would be called when he was needed. Claimant did not hear anything from respondent until January 2012, when he was told that he was no longer needed. This announcement came after claimant inquired about filing for unemployment because he was broke and needed money.

At the request of his attorney, claimant met with Edward J. Prostin, M.D., for an examination on April 10, 2012. Claimant reported repetitive minor trauma from his work as a welder for respondent. Claimant had complaints of difficulty with his shoulders, the right more than the left, difficulty lying on his right side more than the left, restrictions of motion with difficulty reaching overhead and reaching his right hand behind his back, significant clicking and popping of the right shoulder, weakness of both shoulders with some difficulties reaching right-handed and lifting bilaterally and episodic numbness and tingling of the right ring finger and little fingers, the right more than the left.

Dr. Prostin opined claimant had sustained repetitious minor trauma with injuries to both shoulders and hands during the course of his employment. He also indicated claimant's condition was contributed to by mild cervical spinal stenosis. He felt that if the arm symptoms worsen, claimant would need either cervical epidural steroid injections or decompressive surgery.

Dr. Prostin assigned claimant a 10 percent whole body permanent partial

impairment for cervical spine stenosis; a 20 percent impairment to the right upper extremity for the shoulder; 10 percent impairment to the right upper extremity for the hand; 18 percent impairment to the left upper extremity for the shoulder; and 10 percent impairment to the left upper extremity for the hand for a combined whole body functional impairment of 38 percent.

Claimant was found to be unable to return to work that requires repetitious forceful gripping, use of impact tools, or significant activities above shoulder height. He was also restricted from lifting more than 35 pounds occasionally. Dr. Prostic reviewed the task list of Jerry Hardin and found claimant could no longer perform 67 out of 83 nonduplicated tasks for a task loss of 80 percent.

Dr. Prostic acknowledged he took no x-rays in his office while examining claimant, nor did he send claimant out for additional diagnostic studies. He acknowledged that while another doctor had made reference to the MRI, he did not actually have the MRI itself and was unable to locate a copy of the MRI report in his file on claimant. Dr. Prostic diagnosed claimant with stenosis of the cervical spine from the clinical exam of claimant. Dr. Prostic did not order EMG or NCT testing to verify nerve root entrapment. He agreed degeneration with osteophyte formation in claimant's cervical spine was not a surprise and was common with someone of claimant's age. At the end of the deposition, claimant's attorney caused the MRI report to be faxed to the doctor's office and he placed the report into evidence, marked as deposition exhibit No. 4.

Claimant met with Peter Bieri, M.D., for a court-ordered IME on August 28, 2012. Claimant presented with complaints of bilateral shoulder pain, intermittent numbness and tingling into the fingers and, depending on the level of activity, difficulty with repetitive gripping and grasping. He also had intermittent neck pain.

Dr. Bieri examined claimant and opined he incurred injury during the course of his employment as the result of repetitive use from April 2008 through October 2009. He noted the injuries involved the upper extremities, with a diagnosis consistent with bilateral impingement syndrome, rotator cuff tear, and entrapment neuropathy at the level of each wrist. During the examination, Dr. Bieri noted no subjective reports of pain to claimant's cervical spine. Additionally, claimant had full and unrestricted range of motion in the cervical spine.

Dr. Bieri felt claimant was at maximum medical improvement and assigned a 7 percent right upper extremity impairment for range of motion deficits in the right shoulder; 4 percent right upper extremity impairment for rotator cuff weakness; and 10 percent right upper extremity impairment for residuals of entrapment neuropathy of a mild nature at the right wrist, for a combined right upper extremity impairment of 19 percent.

Dr. Bieri assigned claimant a 10 percent left upper extremity impairment for residuals of distal clavicle excision; 5 percent left upper extremity impairment for range of motion deficits of the left shoulder; 4 percent left upper extremity impairment for rotator cuff weakness; and 10 percent left upper extremity impairment for residuals of entrapment neuropathy of a mild nature at the left wrist, for a combined left upper extremity impairment of 25 percent. Dr. Bieri noted that, while claimant had some subjective complaints of neck pain, the pain appeared to originate in the shoulders. Therefore, he did not feel claimant demonstrated permanent impairment of the neck on the basis of pain.

Dr. Bieri went on to assign restrictions to limit occasional lifting to 50 pounds, frequent lifting to 20 pounds, constant lifting to 10 pounds; shoulder and overhead use bilaterally is precluded; repetitive gripping and grasping should be performed no more than frequently; limit the use of power equipment to occasional or frequent. Dr. Bieri reviewed the task list of Jerry Hardin and found claimant could no longer perform 59 out of 330 duplicative tasks, with the Board determining there were 83 non-duplicative tasks, resulting in a 71.1 percent task loss.

Claimant met the Jerry Hardin, via telephone, for a vocational assessment on July 19, 2012. Mr. Hardin opined that, taking into consideration claimant's physical health, education, training and tasks performed over his past work history before the injury, there remained comparable, substantial and gainful employment claimant had the ability to perform.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

In workers compensation litigation, it is claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

¹ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 2007 Supp. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

Claimant alleges injury to his cervical spine, supported by the testimony of Dr. Prostic. However, Dr. Prostic took no x-rays of claimant and testified, apparently without the aid of an MRI performed on claimant's neck. Additionally, the record is void of any contemporaneous reports of an injury to claimant's neck. Dr. Bieri examined claimant's neck, finding a normal range of motion and no subjective reports of cervical spine pain. It is significant that Dr. Bieri was a court-ordered examiner, and not hired by either party. The Board finds claimant failed to prove he suffered any injury or functional impairment to his cervical spine while working for respondent.

K.S.A. 44-510e Furse 2000 defines functional impairment as:

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2007 Supp. 44-501(a).

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

therein.⁵

Docket No. 1,043,845

The Board finds claimant suffered personal injury to his left shoulder and right forearm as the result of the injuries sustained while working for respondent with an accident date of April 10, 2008. The opinion of Dr. Bieri is the most persuasive resulting in a left shoulder functional impairment of 25 percent and a right forearm functional impairment of 10 percent. Pursuant to the stipulation of the parties, the Award of the ALJ is modified from a 10 percent functional impairment to the shoulder to a 10 percent functional impairment to the forearm in this docketed claim. The 25 percent impairment to the left shoulder is affirmed.

Docket No. 1,046,226

The Board affirms the finding of the ALJ that claimant failed to provide timely notice in this matter. An award in this claim is denied.

Docket No. 1,050,164

Claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent to her right shoulder. Based upon the medical opinion of Dr. Bieri, claimant is awarded an 11 percent functional impairment at the level of the shoulder. The ALJ's Award is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified pursuant to the stipulation of the parties to award claimant a 10 percent functional impairment to the right forearm in Docket No. 1, 043,845, but affirmed in all other respects. With the exception of the recalculation of the right forearm in Docket No. 1,043,845, the Award of the ALJ is affirmed in all regards.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated June 24, 2013, is modified in Docket No. 1,043,845, but affirmed in all other respects.

⁵ K.S.A. 44-510e(a) Furse 2000.

Docket No. 1,043,845**LEFT SHOULDER**

Claimant is entitled to 48.57 weeks of temporary total disability compensation at the rate of \$393.35, in the amount of \$19,105.01, followed by 44.11 weeks of permanent partial disability compensation at the rate of \$393.35, in the amount of \$17,350.67 for a 25 percent loss of use of the left shoulder, and a total award of \$36,455.68. This entire award is found to be due and owing and ordered paid in one lump sum, minus any amounts previously paid.

RIGHT FOREARM

Claimant is entitled to 20 weeks of permanent partial disability compensation at the rate of \$393.35 per week, in the amount of \$7,867.00 for a 10 percent loss of use of the right forearm. This entire amount is found to be due and owing and ordered paid in one lump sum, minus amounts previously paid.

Docket No. 1,046,226

Pursuant to the findings above, claimant is denied any award in this docketed matter.

Docket No. 1,050,164**RIGHT SHOULDER**

Claimant is entitled to 39.72 weeks of temporary total disability compensation at the rate of \$413.35 per week in the amount of \$16,418.26, followed by 20.38 weeks of permanent partial disability compensation at the rate of \$413.35 per week, in the amount of \$8,424.07, for an 11 percent functional loss of use of the right shoulder, totaling \$24,842.33. This entire award is found to be due and owing and ordered paid in one lump sum, minus amounts previously paid.

TODD W. FENIMORE

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DOCKET NOS. 1,043,845
1,046,226
1,050,164

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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